

**IN THE SUPREME COURT  
STATE OF MISSOURI**

<b>IN RE:</b>	)	
	)	
<b>JOBY J. RAINES</b>	)	<b>Supreme Court #SC94449</b>
	)	
<b>Respondent.</b>	)	

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**RESPONDENT'S BRIEF**

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**KEMPTON AND RUSSELL**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....	1
TABLE OF AUTHORITIES .....	2
STATEMENT OF ADDITIONAL FACTS RELIED ON .....	3
POINT RELIED ON .....	4
ARGUMENT.....	5
CONCLUSION .....	17
CERTIFICATE OF SERVICE.....	18
CERTIFICATION: (RULE 84.06(c)).....	19

## **TABLE OF AUTHORITIES**

### **CASES**

*In re Stewart*, 342 S.W.3d 307 (Mo. banc 2011) ..... 4, 5, 6, 7, 14

### **OTHER AUTHORITIES**

ABA Standards for Imposing Lawyer Sanctions, Standard Rule 9.32 ..... 4

### **RULES**

Rule 5.21 ..... 4, 8

Rule 5.225 ..... 4, 5, 9, 10, 12

## STATEMENT OF ADDITIONAL FACTS

Respondent entered and completed the DWI Treatment Court. He completed the DWI Court in an exemplary and model manner. **A43 (T71)**. As a result in his treatment in the DWI Court he stopped drinking in October 2012 and has not had a drink since. **A35 (T40)**. He has changed his lifestyle and no longer goes to the bars after work and has become more dedicated and focused in his work. **A36 (T41)**. The Sheriff of Saline County, Wally George, The Mayor of Marshall, Mark T. Gooden, **A46 (T84)**, and the Judge of the Drug/DWI Court, the Honorable Hugh Harvey, **A44 (T73)**, all testified that they recommended probation for Respondent, that Respondent was not likely to harm the public, and was able to practice law without causing the Courts or the profession to fall into disrepute. Sheriff George indicated that Respondent had a good reputation, was one of the top lawyers in the County, that he is possessed of excellent integrity and ability and if the Sheriff needed a lawyer, Respondent would be the attorney he would employ. **A51 (T101)**.

The Mayor testified that the clientele served by the Respondent are underprivileged. **A46 (T84)**.

Respondent's work in the Drug/DWI Court is of such a nature that Judge Harvey has asked him to become a member of the defense team. **A43 (T72)**. Judge Harvey indicated that if Respondent were to be suspended and not placed on probation, he would not be able to participate as a member of the team. **A45 (T80)**.

**POINT RELIED ON**

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITHOUT LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS AND SHOULD STAY THE SUSPENSION AND PLACE RESPONDENT ON PROBATION FOR A PERIOD OF THREE YEARS BECAUSE THE HOLDING OF *IN RE STEWART* DOES NOT PRECLUDE A STAYED SUSPENSION IN RESPONDENT'S CASE WHERE THE RESPONDENT HAD TWO DWI'S AND ONE DRIVING WITH EXCESSIVE BLOOD ALCOHOL CONTENT AND THE RESPONDENT WAS NOT CONVICTED OF A FELONY AND RESPONDENT IS ELIGIBLE FOR PROBATION PURSUANT TO RULE 5.225.

*In re Stewart*, 342 S.W.3d 307 (Mo. banc 2011)

ABA Standards for Imposing Lawyer Sanctions, Standard Rule 9.32

**RULES**

Rule 5.21

Rule 5.225

## ARGUMENT

**THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITHOUT LEAVE TO APPLY FOR REINSTATEMENT FOR SIX MONTHS AND SHOULD STAY THE SUSPENSION AND PLACE RESPONDENT ON PROBATION FOR A PERIOD OF THREE YEARS BECAUSE THE HOLDING OF IN RE STEWART DOES NOT PRECLUDE A STAYED SUSPENSION IN RESPONDENT'S CASE WHERE THE RESPONDENT HAD TWO DWI'S AND ONE DRIVING WITH EXCESSIVE BLOOD ALCOHOL CONTENT AND THE RESPONDENT WAS NOT CONVICTED OF A FELONY AND RESPONDENT IS ELIGIBLE FOR PROBATION PURSUANT TO RULE 5.225.**

This case is not about whether suspension is the proper discipline. Respondent has agreed that due to Respondent's prior reprimand for violating Rule 4-8.1(c) by failing to respond to a request for information from the OCDC and his failure to respond to the same type of request in this case coupled with his driving history a suspension is warranted. The issue is whether the suspension should be stayed and Respondent placed on probation.

The OCDC believes that the decision of this court in *In re Stewart*, 342 S.W.3d 307 (Mo. banc 2011) forecloses any possibility of probation in this case because there are multiple convictions for alcohol related events. Respondent believes the OCDC has misread the Stewart case.

Stewart involved a lawyer who entered pleas of guilty to four separate charges of DWI, the last of which was a felony. In connection with that felony Stewart was sentenced to a term of three years in the Missouri Department of Corrections and execution of that sentence was suspended. Stewart was required to spend 60 days in jail but was allowed work release to go back to his practice of law. At the time of his arrest for the DWI which resulted in his felony conviction, Stewart was found passed out and intoxicated behind the wheel of his vehicle.

In contrast to Stewart's three misdemeanor DWI convictions and his felony conviction for which he was sentenced to three years and required to undergo 60 days of shock time, Respondent has been convicted of two DWI's and one driving with an excessive blood alcohol content. Respondent's first alcohol related event occurred on November 30, 2003 in Springfield. As a result of that arrest he entered a plea in the Springfield Municipal Court to a BAC. His second alcohol related event occurred in Springfield on July 23, 2004 and he entered a plea of guilty to DWI on January 21, 2006. Respondent's last alcohol event occurred February 10, 2012 in Marshall Missouri. After completion of the Drug/DWI Court, Respondent entered a plea of guilty to the Misdemeanor of Driving While Intoxicated on May 5, 2014.

Respondent had two alcohol related offenses which occurred within approximately eight months of each other and then did not have another alcohol related offense for over seven years.

*In re Stewart l.c. 308*, this court stated in light of Stewart's multiple instances of drunken driving and the seriousness of his felony conviction, he is suspended indefinitely from the practice of law with no leave to apply for reinstatement for six months after the mandate was issued.

The court's opinion is divided into six denominated sections. The court specifically addressed the issue of whether a stayed suspension was warranted in section IV. In section IV at page 312 the Court stated "staying Stewart's suspension for a period of probation would be inconsistent with this Courts previous cases involving felony convictions for multiple DWI's. cf *In re Hopkins, no: SC89163(Mo banc 2008)* (disbarring an attorney convicted of Class C felony DWI who was to be incarcerated for a substantial period of time; *In re Laskowski, no: SC86555 (Mo banc2005)* (Suspending an attorney without leave to reapply for three years after a conviction of Class D felony DWI.)"

It is clear that the holding in Stewart denying a stayed suspension is based on the fact that Stewart was convicted of a felony, received a three year sentence and the felony arose from four DWI's.

As mitigating factors in Stewart, the Court noted his limited prior disciplinary history, his remorse, his ongoing struggle with alcoholism, and his commitment to sobriety shown by participation in extensive inpatient and out patient treatment, and his attendance at numerous AA meetings. The Court raised the concern that Stewart should have advised the OCDC of his criminal conduct back in 2009 when he received his admonition. The OCDC has raised an issue in this case that Respondent did not report his BAC and prior DWI to the OCDC and did not report his pending DWI to OCDC. There is no rule in Missouri which requires a lawyer to report his own misconduct to the OCDC and there is nothing in this record that shows that the OCDC made any inquiry of Respondent as to whether he had any pending or prior legal difficulties. The reporting requirement is one that is often contained in conditions of probation but there is no rule requiring self reporting and no notice to the Bar that there is such a requirement.

The OCDC continues to contend that the fact that Stewart was convicted of a felony should have no impact in this case. Clearly it initially had impact for the OCDC because the OCDC filed the Stewart case under Rule 5.21 which permits a summary proceeding where a lawyer has been convicted or pled guilty to a felony. The OCDC thought the fact that there was a felony was significant enough to utilize that procedure. The court obviously believes the conviction of a felony is a significant event and that is the reason that the summary procedures of 5.21 are available.

The Disciplinary Hearing Panel in Respondent's case noted that he had a prior reprimand for issues unrelated to his alcohol and driving issues, and he had a

commitment to sobriety which was evidenced by the fact that after entering the treatment court Respondent made a commitment not to consume alcohol and has not consumed alcohol since October of 2012.

It is suggested that Stewart's case is a substantially different case than the case of Respondent and that the holding in Stewart does not in any way put probation out of play in Respondent's case. Probation would in fact be consistent rather than being inconsistent since Respondent did not have four alcohol related events and Respondent did not have any felony convictions. The Court's rationale that a felony conviction after four DWI's where there was a sentence of three years imposed together with 60 days shock incarceration and probation is sound and well reasoned. When looking at maintaining the integrity of the profession and whether a lawyer's conduct has brought disrepute to the courts and the legal profession the impact of a lawyer being a "convicted felon" is substantially different from being a "convicted misdemeanor." Informant seemed unwilling to recognize the difference between three misdemeanor DWI's and a felony DWI, Stewart's case, and Respondent's two DWI's and one BAC. The OCDC inexplicably and erroneously refers to Respondent's two misdemeanor DWI's and his BAC as "drunk driving cases." See Informants Brief pages 8, 14, 15, 19, 20, 22, 23. Respondent's alcohol related events are not three drunk driving cases. They are two DWI's and a BAC.

Respondent is eligible for probation. There is nothing about his driving record that forecloses consideration of probation. The Court has adopted Rule 5.225 which

governs the eligibility for probation. The test for eligibility for probation is whether the lawyer is unlikely to harm the public during the period of probation and can be adequately supervised; whether the lawyer is able to perform legal services and able to practice law without causing the Courts or the profession to fall into disrepute and whether or not the lawyer has committed acts which would warrant disbarment. The Rule goes on to further provide that in placing a lawyer on probation the nature and circumstances of the misconduct and the history, character, and health status of the lawyer are to be taken into consideration.

Looking at Rule 5.225 it is clear that Respondent is eligible for probation. There has been testimony from Judge Harvey who runs the drug/DWI Court in Saline County, that Respondent is unlikely to harm the public, is able to perform legal services and is able to practice law without causing the Courts or profession to fall into disrepute. The Sheriff of Saline County, Sheriff Wally George, the longest serving Sheriff in Missouri, also testified to that effect as did Mark Gooden the Mayor of the City of Marshall. The testimony of the Judge, the Sheriff, and the Mayor is unrefuted. Those three witnesses did not indicate that there was any damage to the integrity of the profession or any disrepute to the profession or the Court occasioned by Respondent's conduct.

Mayor Gooden in fact testified that he believed the citizens of Marshall were well aware that Respondent had the DWI in Marshall and went through the drug/DWI court. From his experience in the community the Mayor's perception was that the citizenry of Saline County looked at Respondent as someone who made a mistake, has changed his

life and has not been the subject of derogatory remarks. **A47 (T85)**. If the perception of the Respondent in Marshall is of a lawyer who has made a mistake and has changed his conduct it would seem any disrepute would already have occurred. Apparently it has not.

Judge Harvey indicated that Respondent went through the 18 month drug/DWI treatment court in Saline County. He described Respondent as a model for the drug/DWI Court. He testified that if Respondent were to be placed on probation that he would want Respondent as part of the Drug/DWI Court team in Saline County as the representative for defendants.

Judge Harvey testified that in regard to the purpose of the drug court “with every individual that is in drug court be it for alcohol or drugs, our intention is to clean them up get them clear of the addiction and make a productive citizen for the state. In response to a question from Respondent’s counsel. Question: “And as I understand the Drug Court concept, the DWI concept, is to get them through with treatment and hopefully cure the addiction or the problem so that they don’t use anymore. And the second prong is for them to be employed, productive citizens?” Answer: “That is correct we want to address the underlying causes of the addiction, we want to address the addiction and then we want to get them back in mainstream get them productive get them going and get them on to a better quality of life.” Question: “And of course if he is suspended without being on probation at least from the standpoint from being a lawyer he isn’t going to be productive and producing?” Answer: “That would be correct.” **A43 (T69.70)**.

Respondent is clearly eligible for probation under Rule 5.225. He can be adequately supervised. In addition to the normal supervision which occurs through the office of the OCDC, he will be informally supervised by Judge Harvey and Sheriff George. Both of those witnesses testified that in a community the size of Marshall and a County the size of Saline, if Respondent were to begin drinking, that each of them would know it and would immediately take steps to remedy that. **A44 (T 74) A51 (T 102)**. Respondent has practiced law for the last two years without any additional problems, he has had no further driving problems and he has turned his life around through the opportunity afforded him through the Drug/DWI Court.

Respondent placed in evidence at the hearing before the DHP the copies of Judge Teitelman's State of the Judiciary Address, **RA3**, and Judge Russell's Remarks to the Annual Meeting of the Missouri Bar. **RA6**. Both of their addresses lauded the accomplishments of the treatment courts in Missouri and noted the number of people who have successfully completed those. The statistics for 2014 will show Respondent as one of those success stories. Respondent has made the election not to drink. He has been successful in not drinking since October of 2012 after he completed his electronic shackling. His testimony that he has not consumed alcohol since October of 2012 is unrefuted and in fact is supported by the testimony of Respondents mother, **A48 (T91)**, and the Sheriff. **A51 (T102)**.

Judge Harvey testified that one of the purposes of the treatment court is to make the offender a productive citizen. The court requires the participant to have a productive

job. If Respondent's suspension is not stayed Respondent will be out of a job for at least six months and probably closer to a year. His clients will have to find a new lawyer. Mayor Gooden testified that Respondent takes care of a lot of underprivileged people. **A46 (T84).** An unstayed suspension would leave those underserved underprivileged people unrepresented. The Supreme Court website for Treatment Courts provides information on how the treatment courts are structured. A printout from the website is contained herein as Respondent's exhibit E. **RA9.** That exhibit provides that treatment court participants are regularly and randomly tested for drug and alcohol use and have to appear frequently before the Judge and treatment team to review their progress. It provides that in the DWI Courts the model is to address the root cause of impaired driving. **RA10.** Close monitoring is enhanced by the use of technological innovations like ignition interlocks and transdermal alcohol detection devices. **RA10.**

Respondent went through the full 18 month DWI Treatment Court. Because he failed a urine test for alcohol early in his treatment, he had to wear one of those alcohol detection devices which in his case was an ankle shackle. Once Respondent put on the ankle shackle he was a model court participant according to Judge Harvey and to Sheriff George.

Respondent has now been not only sober, the Saline County DWI Court wants him to fill the role of defense attorney mentioned on the website. **RA9**

One of the beauties of the DWI Court is that it requires judicial supervision unlike people who go to private treatment facilities. The Court knows how the treatment court offender is doing. It interacts with him and is able to provide encouragement and rewards for good conduct and to provide sanctions for bad conduct.

In Respondent's case the treatment court has done its' job. It has gotten to the root cause of Respondent's alcohol abuse. Respondent no longer puts himself in situations where he is going to be around alcohol. He has stopped doing the bar scene after work and has made the decision to take alcohol out of his life for the last two years. The OCDC seems to believe while it is clear that Respondent's model completion of the DWI Court is a mitigating factor, it should not be considered because in determining whether or not the integrity of the Bar has been affected that does not look to the Attorney's conduct going forward. **A58 (T129)**. Clearly the OCDC has misread the Stewart case when it says the fact that it was a felony is not important. The effect of that misreading of the Stewart case is highly important. In her argument counsel for the Informant advised the Disciplinary Hearing Panel "and I will totally concede that *In re Stewart* is very integral to OCDC sanction recommendation. The court in that case which is a very recent case in 2011 that involved a lawyer who granted had felony DWI's and Mr. Raines while being allowed the grace to go through drug court was able to plead guilty to a misdemeanor rather than a felony. But we would argue that it's the conduct as the cases tell us that the panel in the Court will be looking at not just whether it has that label of felony rather than misdemeanor. Because a lawyer may be eligible does not mean that

probation is require in any case. Probation was recommended by OCDC in the Stewart case and the Court said that no, an actual suspension was the appropriate sanction. Mitigating circumstances, such as Mr. Raines successful participation in Drug Court can not overcome the seriousness and the multiplicity of his conduct.” **A55 (T119, 120).**

Respondent as an attorney has a unique position to help the DWI Court in Saline County, to help the underprivileged clients he represents and to be a success story and role model for the DWI Court. As Judge Harvey testified one of the goals of the DWI Court is to put the offender into the position of being a productive citizen with a job. It would be inconsistent with the goals of the treatment courts to have someone complete the DWI Court and not be able to work for six months.

By all accounts Respondent is an able Attorney. He is involved in community activities, ie President of Rotary, and service on the United Way. He is honest and well respected. His future work with the DWI Court as the team defense member and his continued freedom from alcohol will make him one of the success stories cited by Judge Teitelman. His DWI Court treatment and success is an example that the Treatment Courts work.

Respondent has proposed terms of probation that have been utilized by the OCDC in other cases. **RA18.** They are appropriate here. The OCDC proposed Mr. Stewart for probation. It should do the same here.

We have contended all along that the Peace Tetteh matter was a fee dispute case over which the OCDC has no jurisdiction. Ms. Tetteh fired Respondent and on July 16, 2012, went to his office and picked up her file. **A28 (T11)**. On that same day she wrote to the OCDC and stated “I am asking for the help of the OCDC to please ask Mr. Raines to give me my refund.” **A28 (T12)**. Within a couple of days after writing that letter Ms. Tetteh made a request to the Fee Dispute Resolution Committee asking for a refund through the Fee Dispute Resolution process. **A28 (T13)**. The parties actually went through the fee dispute resolution process and resolved the matter when Respondent agreed to refund \$1800.00 to Ms. Tetteh. Unfortunately Respondent did not immediately write his check for the \$1800.00 as he should have, but Ms. Tetteh did in fact received her money approximately five months after Respondent agreed to pay it. Ms. Tetteh hired another attorney to handle her domestic relations matter and apparently her matter was concluded without any detriment.

Ms. Tetteh took her case to the Fee Dispute Resolution Committee. It was resolved there. She received her \$1800.00 refund and the matter was concluded by the Fee Dispute Resolution Committee. Fee Disputes are outside the jurisdiction of the OCDC. The Tetteh matter should have not been apart of this proceeding, however, even if we concede that it should have been or that it was a proper part of the proceeding, the conduct there is not such that it would disqualify Mr. Raines for probation. The provision in his probation conditions provides that he needs to have a mentor. If he had a matter come up in the future such as occurred in the Tetteh matter he would have

someone to talk to about how he should respond. He has learned from his mistake in the Tetteh case and in response to a question to the chair of the DHP as to what would happen with unearned fees in the event Respondent did not receive probation, Respondent indicated they would all be returned. **A52 (T108).**

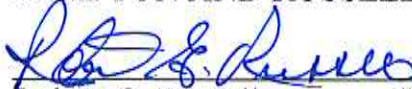
Discipline is not imposed to punish the lawyer. To deny probation to Respondent would clearly punish him while a stayed suspension with probation would allow him to assist the DWI Treatment Court to take care of his clients and to be a productive member of society all without harm to the public and without bringing the Courts and the profession into disrepute.

## **CONCLUSION**

Respondent's completion of the DWI Court in a model fashion, his change in his lifestyle, his sobriety and his freedom from consumption of alcohol since October of 2012, his ability to practice law without harm to the public and without causing the courts or the profession to fall into disrepute, his remorse, his willingness to become the defense member of the DWI Court team, his accomplished goal of becoming a productive working member of his community, his community service, his reputation, and his work for underprivileged members of the community all mitigate in favor of a stayed suspension and accordingly the Court should suspend Respondent indefinitely, stay the suspension, and place Respondent on probation for a period of two to three years in accordance with the proposed conditions of probation.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of November, 2014, the Respondent's Brief was sent through the Missouri Supreme Court e-filing system to Informant's counsel:

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Robert G. Russell

**CERTIFICATION: RULE 84.06(c)**

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 4,063 words, according to Microsoft Word, which is the

word processing system used to prepare this brief.

  
Robert G. Russell